



**MINUTES
FREMONT PLANNING COMMISSION
REGULAR MEETING OF JANUARY 9, 2003**

CALL TO ORDER: Chairperson Cohen called the meeting to order at 7:00 p.m.

PRESENT: Chairperson Cohen, Commissioners Weaver, Wieckowski, Harrison, Thomas, Natarajan, Sharma

ABSENT: None

STAFF PRESENT: Jeff Schwob, Senior Planner
Michael Barrett, Senior Deputy City Attorney
Daniel LaForte, Planner I
Alice Malotte, Recording Clerk
Chavez Company, Remote Stenocaptioning
Mark Eads, Video Technician

APPROVAL OF MINUTES: None

CONSENT CALENDAR

THE CONSENT LIST CONSISTED OF ITEM NUMBERS 1, 2, 4, 5, AND 6.

IT WAS MOVED (HARRISON/WEAVER) AND UNANIMOUSLY CARRIED BY ALL PRESENT THAT THE PLANNING COMMISSION TAKE THE FOLLOWING ACTIONS ON ITEM NUMBERS 1, 2, 4, 5, AND 6.

Item 1. DHAM RESIDENCE GRADING & LANDSCAPING – 1130 Highland Terrace – (PLN2003-00041) – to consider a Planned District Minor Amendment to P-96-11 and Preliminary Grading Plan for changes to grading and landscaping for a previously approved new single-family residence. This project is categorically exempt from CEQA review under Section 15303, New Construction or Conversion of Small Structures. (Continued from October 24, 2002 and November 21, 2002.)

CONTINUE TO AN UNCERTAIN DATE AND TO BE RENOTICED AT THAT TIME.

Item 2. UNION 76 CARWASH EXTENSION – 46840 Warm Springs Boulevard (MIS2003-00487) - to consider an extension of time for a conditional use permit for the remodel of an existing 1,576-square foot gasoline service station, including conversion of one existing service bay to a car wash and conversion of another to a food mart, located in the Warm Springs Planning Area. A Mitigated Negative Declaration was previously prepared and adopted for this project.

Commissioner Natarajan asked that the required additional landscaping be brought before the Commission as an information item.

Deputy Planning Manager Schwob agreed to do so.

HOLD PUBLIC HEARING;

AND

FIND THAT NO CHANGES TO THE PREVIOUSLY ADOPTED CONDITIONAL USE PERMIT [PLN2000-00343] ARE REQUEST BY THE APPLICANT;

AND

FIND THAT THE PREVIOUS ADOPTED MITIGATED NEGATIVE DECLARATION IS STILL APPROPRIATE FOR THIS PROJECT AND THAT NO FURTHER REVIEW IS REQUIRED;

AND

APPROVE MIS2003-00487, AMENDING CONDITION A-14 TO EXTEND THE DURATION OF APPROVAL FOR THE CONDITIONAL USE PERMIT TWO YEARS FROM THE DATE OF THIS REPORT, AND DELETING CONDITIONS A-1, E-1 AND E-2 AS THEY ARE NO LONGER APPLICABLE, AS INDICATED IN EXHIBIT "B" OF PLN2000-00343.

- Item 4. **WARM SPRINGS TENTATIVE TRACT MAP 7409 – 49055 Warm Springs Boulevard – (PLN2003-00074)** - to consider Tentative Tract Map 7409, a Private Street, and a revised Preliminary Grading Plan for the previously approved 194-unit Warm Springs Planned District (P-2002-76) located in the Warm Springs Planning Area. A Mitigated Negative Declaration was previously prepared and adopted for this project.

Deputy Planning Manager Schwob stated that a voluntary offer was made regarding below market rate participation and was accepted at the time of approval of the planned district. He noted the subsequent condition was added, as follows:

- 25. Prior to the first occupancy permit, the Property Owner shall enter into a BMR Regulatory Agreement with the City to provide at least 10% of the project for participation in the below market rate (BMR) program. The Agreement is subject to approval by the Office of Neighborhoods and shall run with the land. This agreement shall be required prior to the issuance of the first building permit for any residential unit.**

Commissioner Harrison asked if the applicant was aware of the additional condition.

Deputy Planning Manager Schwob stated that he was.

Commissioner Sharma believed this was a "great project" and encouraged development of similar projects within the City through rezoning.

HOLD PUBLIC HEARING;

AND

FIND PLN2003-00074 IS CONSISTENT WITH AND COMPLIES WITH ALL PORTIONS OF THE PREVIOUSLY APPROVED MITIGATED NEGATIVE DECLARATION (PLN2002-00076);

AND

FIND PLN2003-00074 IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY'S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATIONS, GOALS AND POLICIES SET FORTH IN THE GENERAL PLAN'S HOUSING AND LAND USE CHAPTERS AS ENUMERATED WITHIN THE STAFF REPORT;

AND

FIND PLN2003-00074 FULFILLS THE INTENT OF THE APPLICABLE REQUIREMENTS SET FORTH IN THE FREMONT MUNICIPAL CODE;

AND

APPROVE PLN2003-00074, AS SHOWN ON EXHIBIT "G", SUBJECT TO FINDINGS AND CONDITIONS ON EXHIBITS "H", "I", AND "J".

- Item 5. BILL BALL PLAZA (formerly known as Centerville Civic Plaza) – 37292 Fremont Boulevard – (PLN2003-00107)** - to consider a general vacation (abandonment) of a portion of Peralta Court located in the Centerville Planning Area. A Negative Declaration (EIA 98-74) was previously approved which included the subject lands.

FIND, AND RECOMMEND TO CITY COUNCIL THAT IT ALSO FIND, THAT THE GENERAL VACATION OF PERALTA COURT CONFORMS TO THE GENERAL PLAN BECAUSE THE PORTION OF ROADWAY PROPOSED TO BE VACATED IS NOT NOW, NOR WILL IT IN THE FUTURE, BE REQUIRED FOR PUBLIC STREET PURPOSES;

AND

RECOMMEND CITY COUNCIL FIND PLN2003-00107, AS PER EXHIBIT “A”, FULFILLS THE APPLICABLE REQUIREMENTS SET FORTH IN THE FREMONT MUNICIPAL CODE AND SECTION 8324 OF THE CALIFORNIA STREETS AND HIGHWAYS CODE.

- Item 6. BAYSIDE MEZZANINE – 3220 Darby Common – (PLN2003-00118)** - to consider a Finding to increase the floor area ratio from 34.4% to 38.1% for an existing building to allow the development of a 1,182 sq. ft. mezzanine. This project is categorically exempt from CEQA review under Section 15301, Existing Facilities.

HOLD PUBLIC HEARING;

AND

FIND THE PROJECT IS EXEMPT FROM CEQA PER SECTION 15301, EXISTING FACILITIES;

AND

FIND PLN2003-00118, FINDINGS FOR FAR INCREASE, IS IN CONFORMANCE WITH THE RELEVANT PROVISIONS CONTAINED IN THE CITY’S EXISTING GENERAL PLAN. THESE PROVISIONS INCLUDE THE DESIGNATION, GOALS AND POLICES SET FORTH IN THE GENERAL PLAN LAND USE CHAPTER;

AND

FIND PLN2003-00118, AS SHOWN ON EXHIBIT “A” (SITE PLAN, FLOOR PLAN) FULFILLS THE APPLICABLE REQUIREMENTS SET FORTH IN THE FREMONT MUNICIPAL CODE;

AND

APPROVE PLN2003-00118 FOR A 1,182 SQUARE FOOT MEZZANINE, AS SHOWN ON EXHIBIT “A”, WITH A CONSEQUENT FAR OF 0.38, BASED ON THE FINDINGS AND CONDITIONS ON EXHIBIT “B”.

The motion carried by the following vote:

AYES:	7 – Cohen, Harrison, Natarajan, Sharma, Thomas, Weaver, Wieckowski
NOES:	0
ABSTAIN:	0
ABSENT:	0
RECUSE:	0

Chairperson Cohen introduced the two new commissioners, Dr. Rakesh Sharma and Anu Natarajan

Commissioner Sharma thanked his family, friends, City staff and Council Members for their support. He briefly described his work as a biologist and how he came to move to the City of Fremont in 1987 after accepting a research position at Stanford University.

Commissioner Natarajan stated that she had lived in the City for eight years and had worked for the City for five years as a planner. She now worked with a planning consulting firm in San Francisco. She had a degree in architecture and urban design was her field of interest. She was pleased to connect again with the City.

PUBLIC COMMUNICATIONS

ORAL COMMUNICATIONS

PUBLIC HEARING ITEMS

- ITEM 3. HASSETT CORP YARD – 401 Orchard Drive – (PLN2003-00073 & MIS2003-00606) -** Appeal of staff determination that a Conditional Use Permit is required when a nonconforming use is changed to a similar use. This project is categorically exempt from CEQA Guidelines Section 15301, Existing Facilities.

MODIFICATION TO STAFF REPORT:

Enclosures:

Exhibit "D" (Letter from concerned addressed to Planning Commission, January 7, 2003).

PUBLIC HEARING

Deputy Planning Manager Schwob noted that a letter from a concerned neighbor, dated January 7, 2003, had been received. Speaking as the Zoning Administrator, he explained that the Commission needed to decide whether the applicant should be directed to file an application for a Conditional Use Permit (CUP) and to determine if the proposed use was similar and less intense than the previous use of the property.

Chairperson Cohen conferred with Senior Deputy City Attorney Barrett and stated that it was determined that he had no conflict of interest with regard to this item.

Peter McDonald, attorney, introduced the property owners, Eric and Felicia Hassett.

Eric Hassett stated that he bought the rundown property two years ago with the knowledge that it had previously been used commercially. He stated that he had applied for a business license in May and was told at that time by the planner that he knew that commercial activity had occurred previously at that location. The business license was rejected and mailed back to him at a later date. He received building permits for various repairs to the property and he proceeded to make electrical and other repairs, painted the buildings, and installed fencing and landscaping. The City required that he prove prior commercial use, and he and his wife reconstructed property history from commercial leases, insurance and business licenses and received an affidavit from the previous owner. He understood that if this evidence was provided to the City, a business license would be issued. He feared that undergoing the CUP process would reject or severely restrict his use of the property. Future owners would have to also go through the CUP process, which would affect the long-term value of his property. He stated that no neighbor had complained to him about his intended use for the property. He passed a copy of attorney McDonald's presentation to the Commissioners.

Mr. McDonald stated that the background documents were also included in the handout to the Commissioners. He stated that the owners had resided in the City for most of their lives. Previously, Hassett Construction was operated from their home. Recently, the business had grown to the point where a corporation yard was needed. In 2001, they purchased the property, which was being used as a corporation yard by Osborne Lumber and Olympic Screen Crafts. It had also been used as a corporation yard by Bodily Construction from late 1940s to early 1990s, according to a letter from Deanna Jonutz of Bodily Construction. Forty-six truckloads of debris were removed along with the improvements mentioned by Mr. Hassett above, which brought the premises up to its "current outstanding condition." The applicants feared that undergoing a CUP process could seriously hamper or terminate their

business. He stated that there were substantial constitutional, statutory and case law protections for legal nonconforming uses, which might be ignored in a discretionary process, such as a CUP application. He did not believe that a CUP was required by the City planning code or by "good planning practice, because 401 Orchard had been used as a corporation yard continuously since the 1940s." He believed that the City planners feared criticism and preferred that the Planning Commission make the decision, which had stretched the process to the point where it had become a "serious burden to a legitimate Fremont business." In his opinion, the rationale for additional requested submittals had changed and become inconsistent, over time. Osborne Lumber and Olympic Screen Craft had used the property as an off-premises corporation yard with their primary offices located elsewhere. The property was being used at present just as it had previously with the interior buildings used for an office, workshop and equipment and building material storage. The occupied single-family home and trailer were the same as before the purchase of the property. The exterior corporation yard was being used for vehicles, equipment and building materials as it was used prior to purchase. The October 22, 2002, Zoning Administrator letter was inconsistent with the Fremont zoning code when it based the decision to require a CUP upon the finding that Olympic Screen Crafts was a "light industrial use" and Hassett Construction was a "corporation yard." He noted that corporation yard was one of the specific uses listed within the light industrial zoning district and light industrial was not listed as a specific use within the light industrial zoning district. The use by Olympic Screen Crafts was specifically a "corporation yard" within the light industrial district. The staff report put forth a new rationale for requiring a CUP, which was. "By long-standing practice, the Zoning Administrator has only allowed the non-conforming status of one business to be transferred to virtually the same business. . . . When any significant modification to the use is proposed, a use permit is required pursuant to . . . " a section quoted at that point. In his opinion, the proposed use was not a significant modification to the use, because it was, in fact, the same use. He gave three interpretations of the word, use:

1. "Any use permitted in the light industrial district
2. "Only the specific use, corporation yard, is permitted, based upon prior usage (most common meaning of the term "use" in normal, zoning parlance)
3. "Any change of a business was a change in use."

Mr. McDonald continued with the belief that the second interpretation requiring consistency with a specific use listed in the zoning district was a common sense approach and was consistent with standard zoning practice for the term "use." If a nonconforming use was truly offensive for a given location, amortization and nuisance abatement were the legitimate zoning tools available to terminate an inappropriate use. A baseline list of the proposed uses for the corporation yard was submitted to the City by the applicant, which could be used to limit any future expansions of the nonconforming use. The third interpretation that a change in the business constituted a change in the use represented a "maximum, in-your-face approach to nonconforming use regulation." This was bad planning practice and would create serious problems for the City of Fremont.

- When dialing up the regulatory standards beyond the words of the ordinance and zoning terms were stretched beyond their normal use in zoning practice, a serious proof problem with specific cases, such as this one, were created.
- Nonconforming uses dealt with constitutionally vested rights and a decision would be subject to heightened judicial scrutiny of the independent judgement standard.
- When dialing up the regulatory interpretation to the maximum, more people would be caught in the regulatory net, which would generate additional administrative burdens and costs. When a person's livelihood and property were at stake, and they felt cornered, they had no option but to fight.
- Aggressive enforcement of nonconforming use restrictions was bad planning policy and put the City back to the planning of the 1960s. Euclidean zoning was based upon the theory that different land uses were incompatible and large single-use sectors were

created with no mixing of uses. It eventually became clear that mixed-use neighborhoods were more vibrant and functional, which was the basis for modern urban planning.

Mr. McDonald concluded that this proposed use would create far less traffic than a multi-family residential use would generate. On-site and adjacent residences provided informal nighttime security that minimized the need for police services. Daytime use of the corporation yard provided "eyes on the street" when many residences were empty. He asked that the Commission find that the Hassett Corporation yard did not constitute a significant modification to the prior use, thereby, avoiding the burden of undergoing the CUP process.

Commissioner Cohen opened the public hearing.

Lynn Reardon, Orchard Drive neighbor, stated that she had noticed a significant increase in industrial traffic during the last two years and she expressed concern about the safety of the neighborhood children.

Commissioner Sharma asked what kind of vehicles the speaker had observed.

Ms. Reardon replied that she had noticed more construction vehicle traffic and very large trucks that had not been in the neighborhood before, which made large, rumbling sounds and interrupted her peace and quiet.

Bobbie Costa, neighbor directly across the street from the property's gate, had noticed no large equipment associated with the corporation yard. (The Union Sanitary District project further down the road involved very large, noisy trucks.) The property had been improved and, in her opinion, the value of her property had been improved, as well. There was far less traffic associated with the corporation yard than when Olympic Screen Crafts and the company that repaired golf carts were using the property, since she bought her home ten years ago.

Commissioner Harrison asked how long she had lived there and was the Bodily's corporation yard operating at the time she moved in.

Ms. Costa replied that she had lived across the street since 1991. The Bodily's corporation yard was gone. However, she stated that she used to do escrows for Dan Bodily and knew of their use of the property. She believed that the traffic and large trucks complained about by the previous speaker were not associated with the current use by the Hassetts or she would know about it.

Commissioner Cohen asked how the current use of the property was different from the use by the last owner/tenant.

Ms. Costa stated that the last use involved lot of people and a lot of activity. Olympic Screen Crafts had vehicles and people coming and going constantly. The woman who lived on the property sold some kind of health foods and vitamins and also had customers coming and going quite a bit.

Leslie Fought, resident on Orchard Drive since 1996, expressed concern about unknown transient construction workers and the safety of the neighbor children. She also mentioned large, heavy construction vehicles traveling up and down the street.

Commissioner Sharma asked the times when the children were exposed to the truck traffic.

Ms. Fought stated that it occurred while walking to and from school and during baseball practices during the summer.

Commissioner Cohen asked how the present use was different from the prior uses.

Ms. Fought replied that she had previously seen smaller vehicles than this owner was using.

Nina Fought, 28-year resident on Orchard Drive, had hated the subject property for all her years on the street and she had regularly called the Code Enforcement Department about it. When she called the Code Enforcement Department concerning the current owner's use of the property, she was told the City was aware of a problem and the property would not be allowed to be used as it had been in the past. The property had not been in use since 1995. She questioned a corporation yard being allowed in a residential neighborhood when she and others in business pay rent for their businesses to be located in areas appropriate for their businesses. She claimed that it was unsafe for her grandchildren to play outside, because of the trucks with ladders on top. She worried about elderly neighbors being able to exit from their driveways without being hit from the heavy truck traffic. She asked why neighbors on streets behind her were not notified of this meeting. She asked that the Planning Commission vote to keep the neighborhood residential.

Commissioner Sharma asked if the previous use of the property was active with people coming in every day at regular times or was it more passive with people occasionally arriving to store or pick up material. How had the use of the property changed within the last five to ten years?

Ms. Fought stated that when it was used as a construction yard, the telephone lines were pulled down by trucks, which ceased when Bodily Construction left. She understood that the other businesses did not have licenses and the property had always been an eyesore. She recalled that the trailer on the street was supposed to be for the night watchman, and transients hung out on the property.

Ed Dillon stated that he lived in the second house from the property. He stated that he was also in the construction business, but he was located in an industrial area in Union City, because he did not feel his business was appropriate for a residential neighborhood. He did not want this construction business in his neighborhood. Although the property was cleaned up by the owner, it did not change the fact that the owner was bringing a construction business into his neighborhood. He had watched the applicant's trucks and employees coming onto the property every day. He had seen medium-sized duty trucks and the occasional delivery truck. He believed that the previously mentioned large construction trucks were associated with Mt. Cascade's job for Union Sanitary District further down the street. He agreed that there was an increase in traffic up and down the street and stated that there was only one way in and out of the neighborhood. The bottom line was that a construction business should not be within two doors down from his home. If he wanted to live in a construction yard, he would move into the one he owned.

Commissioner Sharma asked if he did not want a construction yard in the neighborhood or if there were other overriding issues, such as more traffic.

Mr. Dillon stated that his biggest complaint was traffic, although the traffic created by the applicant seemed to be contained within during normal business hours (and sometimes on the weekend). He reiterated that he did not want a construction company in his neighborhood.

Felicia Hasset, applicant, read supporting letters from neighbors on Jones Way, Barton Drive, Orchard Drive, two neighbors on Goodrich Way and the office administrator for the Forrest Bodily Company which had operated the yard from 1940 to the 1990s. They stated that since the Hassetts bought the property:

- Traffic had not increased.
- The property had been improved, which had improved the neighborhood.
- The owners had proved to be good neighbors.
- The property had always been used as a corporation yard.
- The owners had a right to use their property as a corporation yard.
- The neighborhood was as quiet as it always had been.

Ms. Hassett passed the letters to the Commissioners.

Commissioner Sharma asked if she was saying that the only way the property could be improved was to use it as a corporation yard. He understood that the property had been much improved and was being property maintained since she and her husband bought it. He asked if the property could also be improved by building a large house or a multi-family building on the property.

Ms. Hassett agreed that the property could be improved “a million different ways,” but the point was that the property had always been used as a corporation yard and they wished to continue to use it as such.

Kevin Fogerty, previous owner of the property, asked that the Hassetts be allowed to use the property as it has always been used. He admitted that he did not maintain the property and it became an eyesore. His family owned and operated Osborne Construction and had used the property for lumber storage. They, eventually, rented the property to commercial tenants who all had business licenses with the City. The property was always treated as an industrial property. The Mission Boulevard construction was causing the increased traffic on Orchard Drive, not the Hassetts’ business. He believed that traffic would continue to back up on local side streets for many years. As everyone knew, traffic had increased all over the City. He urged the Commission to approve the appeal and allow the Hassetts to operate their business and use the property as it had always been used since the 1940s.

Commissioner Harrison asked if the speaker lived in the Orchard Drive area and what the traffic pattern had been compared to traffic since the Hassetts came onto the property.

Mr. Fogerty replied that he used to live on Oliver Way (the first Orchard Drive cross street) and he currently lived on Canyon Heights Drive. He believed that, essentially, traffic was same.

Commissioner Cohen asked when his family had owned the property and when did Osborne Construction stop using it. He asked if Olympic Screen Craft moved onto the property immediately after Off Course Golf Carts was no longer a tenant. Exactly what did the golf cart company do on the property? After the golf cart left the property, what exactly did the screen-craft company do? Was the screen-craft company evicted?

Mr. Fogerty stated that the property was sold during the year 2001 to the Hassetts. The construction company stopped using the property for storage when it rented it to Off Course Golf Carts in the mid-1990s. They were there for approximately two years, then the property was rented to Olympic Screen Craft in 1995 who began using it immediately. He stated that he “didn’t want any dead months;” he wanted to keep the property rented. He understood that the golf cart company sold, rented and repaired golf carts and other kinds of equipment. He recalled large trucks that could transfer six golf carts being on the property, along with the occasional cherry picker. The Olympic Screen Craft did printing and the shop foreman lived on the property and repaired printing presses and related equipment. Stanley Steamer automobiles were also stored and repaired on the property. Yes, Olympic Screen Craft was evicted by the Hassetts. They bought the property with Olympic Screen Craft as a tenant.

Commissioner Natarajan asked how many employees worked on the site when Osborne Construction was using the site; how many employees worked for the golf cart business; and how many for the screen-craft company.

Mr. Fogerty replied that Osborne Company had two employees occasionally on the site; the golf cart business had no more than six employees; and the screening company also had about six employees.

Dwight Worsham asked how many Commissioners had seen the property. He passed pictures among the Commissioners that he had taken that day that showed the Hassett property as it currently looked from his front yard. Mr. Hassett also put up a sign that stated, "Slow, children at play," which was shown in one of the photos. Another photo showed one house with the five autos compared with the two pickups owned by the Hassetts. He stated that he had lived on Orchard Drive for 20 years. He assumed that an apartment building (with as many as eighteen vehicles) could be built on the property, rather than the two pickups that the Hassetts had. Since the Hassetts purchased the property, he had never seen more than six vehicles enter and exit the property in a day. The noise that the neighbors complained about came from the big personally owned diesel pickups driving down the street, not from the Hassett's business. He understood that the Hassett employees did not regularly come to the office to be assigned a job, because they went directly to the job. He supported the Hassetts business continuing at this location.

Commissioner Harrison asked what the volume of traffic was when the Bodily corporate yard was using the property compared to what it was currently.

Mr. Worsham said the property was very busy when the Bodily Construction used the property as a corporate yard. The lumberyard, the golf carts and the printing company were not as bad.

Commissioner Sharma asked if the previous business had kept the property clean and maintained with the trucks coming in and out.

Mr. Worsham stated that the previous business moved many vehicles in and out, but it was not "all clean and maintained." The son of the woman who ran the herbal shop did the gardening, but when he moved out, the property became "rather bad." Mr. Hassett cleaned up the property and even put in a swing for the neighborhood kids. He built a fence along the side and when a neighbor complained, he moved it back.

Mr. Hassett stated that he had one large dump truck that was usually on the job site. Most of his employees and their vehicles traveled directly to the job site at 7:00 a.m. He was concerned about creating noise and believed that he was quieter than any other previous occupant had been. Union Sanitary was putting in a new sewer main project and all of the streets in the neighborhood were being torn up. The big trucks belonged to them. The property was designed to be used as it had been used for the last 50 years, with a 6500+ square foot warehouse. He reiterated that the City had issued permits for him to improve the property. He felt that the approximately 200,000 dollars he had spent on improvements was good for him and the neighborhood.

Attorney McDonald noted that the close-in neighbors loved the property and the further neighbors blamed the trucks and noise on the property use. He believed that this use was no different from any of the other uses by previous other tenants. There was no question that the property had been used as a corporation yard for approximately 50 years. At staff's request, the baseline for the expected uses on the property had been submitted, which the owner expected to adhere to now and in the future. There was no "substantial change in the use," which the Commission should find. Any decision by the Commission would be subject to the independent judgement of a court concerning if there had been a substantial change in

the use. It was not like a discretionary CUP process. He acknowledged that any neighbor would prefer not to have the property used as a corporation yard. If the neighbors "really" did not want to have it there, the property could be rezoned for a small apartment complex after a ten or fifteen year amortization period. At this time, he believed the Hassetts had a legal right to use the property as a corporation yard.

Commissioner Sharma corrected the impression that he had suggested that the property could be converted to an apartment complex or some kind of bigger urban situation. He noted that a mobile home and a rental house were also on the property.

Commissioner Natarajan asked if his client was aware of the zoning and that there was a nonconforming use of the property. Were he or his client aware of any permits to operate a corporation yard at the site?

Mr. McDonald was not sure that his client knew that. He understood that Mr. Hassett knew that the Fogertys and Bodily Construction had used the property as a corporation yard, which had been there longer than the surrounding houses. The two incidents that convinced his client that he could legally use the property as a corporation was 1) he received a building permit to make improvements and 2) the planner initially issued the business license. He believed that a supervisor second-guessed the planner who was in the process of issuing the business license. He believed that the ordinance was being "dialed beyond what one could constitutionally defend for a legal nonconforming use." This was the same use as had been going on since the 1950s. He stated that when the business license was not approved, his client called him, so he did not know of any other permits by other businesses that had occupied the site.

Commissioner Cohen agreed that the issue was whether the present use was the same as the previous use. If it was, the speaker was right and the Zoning Administrator was wrong. Whether or not the City wanted to eliminate a nonconforming use on the property was irrelevant. However, in his opinion, a printing company was different from a construction company. City staff had made that distinction and the applicant's argument was that the one had to be broader in the category, based upon the distinctions in the zoning code.

Mr. McDonald replied that staff used the right words, but did not follow through with an analysis. The issue was that the current use was not a substantial change. He mentioned aerial photos taken during different times when the property was used and they proved that the property had been used as a corporation yard throughout the years. If this issue went to court, he believed it would be decided that the substantial use had not changed. To change the use of the property, the City could adopt an amortization proceeding, as he mentioned earlier.

Chairperson Cohen asked the speaker if the printing company had used the property in the same way that his client was currently using it.

Mr. McDonald stated that it had, based on the facts that had been presented and the aerial photos.

Commissioner Cohen closed the public hearing.

Commissioner Natarajan asked for a sense of the chronology of the events that had happened, so far.

Deputy Planning Manager Schwob stated that the applicant applied for a business license and the planner at the front counter signed off on it, based on his impression that the property had been used for something besides residential. When the application was further reviewed it was discovered that there were complaints filed with the code enforcement from various

neighbors. The complaints indicated that there were problems on the property. Staff contacted the code enforcement officer who indicated that the use had changed, based upon interviews he had with some of the neighbors, some of whom spoke tonight. Staff met with the Hassetts and their attorney and obtained information about the previous uses for the property. Olympic Screen Crafts had a business license at another location, but was utilizing this property for various uses. The comparison should be between the use of the property at the time the Hassetts purchased it and the proposed use.

Commissioner Harrison asked if the current proposed use was to be compared to the uses by Bodily Construction (which was grandfathered in from pre-1956 and operated to the early 1990s) and Osborne Lumber (which stored equipment on the property), with the golf cart and printing use being irrelevant.

Senior Deputy City Attorney Barrett stated that his facts were relevant if the nonconforming use was to be continued and the comparison went back to Bodily Construction. The use became nonconforming when the City incorporated. The label "corporation yard" could mean many things.

Commissioner Natarajan asked if Bodily Construction's use was to be the baseline, should not that level of intensity have continued until this use took over?

Senior Deputy City Attorney Barrett stated that was part of the question as to whether the use was continuing or whether there had been a discontinuance of the use. The applicant claimed that the use was continuing through the period. Different facts had been presented about the different levels of intensity of the use of the property. The owner of the lumberyard spoke about the other uses of the property that had occurred between his company's use and the current application.

Commissioner Natarajan clarified that if one was talking about a nonconforming use continuing, it had to be of similar intensity in order to compare the current use with the previous use.

Senior Deputy City Attorney Barrett stated that the issue was whether the proposed use was an intensification or an enlargement of the use that was in existence at the time it became nonconforming. Procedurally, this was the essence of the staff's recommendation for the Planning Commission to direct a process to occur where the staff could explore the additional facts.

Commissioner Sharma noted this area was primarily a residential area and the City could not do anything about it for the longest time. Now, the issue is "do we propagate it or try to save it as a residential area to keep it residential?" If the City had a legal right to keep the area strictly residential, he would vote for approval. The children's' safety was important. The applicant and his employees did not live on that street.

Commissioner Natarajan asked the difference, procedurally, between a zoning administrative process, in which the residents around the property were notified versus the CUP process.

Deputy Planning Manager Schwob stated that the CUP would come before the Planning Commission, which is the required process specified by the code. Theoretically, every time the use changed, the City should have made a determination that, for example, the golf cart use was less intense than the use by Osborne Lumber which was less intense than the use by Bodily Construction. Therefore, the impacts to the neighborhood were minimized by allowing equal or lesser intensity use on the property as its use evolved. However, no determinations had been made regarding the various uses, so staff tried to determine whether there had been a same continuous use of the property.

Chairperson Cohen asked if there had been a break in the nonconforming use, would the applicant need a CUP.

Deputy Planning Manager Schwob stated that if a nonconforming use ceased for one year, it could not be reestablished as a nonconforming use and had to conform to the existing zoning code, which, in this case, was residential.

Chairperson Cohen believed that the print screening company was clearly different from the lumberyard company and he did not believe the use by the printing company corresponded to the definition of a corporation yard. He saw that use as completely different, qualitatively, from the Bodily Construction use and the present proposed use. He saw a break in the use. The golf cart use was less clear. If there was a break, was there an implication that the applicant needed a CUP?

Senior Deputy City Attorney Barrett replied that if the conclusion was that there was a break, then the legal nonconforming issue was no longer before the Commission. The determination was made that the proposed use was no longer a legal, nonconforming use and there would be no opportunity for a CUP for this use in this zone.

Deputy Planning Manager Schwob agreed.

Chairperson Cohen stated that the applicant's attorney did not see a distinction because he saw it broadly, i.e., the printing company came in under the broad category of use. He was arguing that it was inappropriate to break the use down to the specific type of use, based on the City codes. He believed that it was within the City's discretion to make that determination. The court would engage in an independent analysis to determine whether the evidence substantially supported a continuing nonconforming use. He acknowledged that "two people could have three opinions." He believed this appeal would eventually go before the City Council.

Commissioner Thomas asked if this use was not allowed, could the zoning be changed for one lot to accommodate this use.

Deputy Planning Manager Schwob replied a General Plan amendment would have to change the land use designation from residential to a land use category that would allow a corporation yard such as light industrial zone. A corresponding rezoning of the property would also have to be done, which would go through a public hearing, review, Planning Commission and City Council.

Commissioner Thomas asked what the cost and time would be.

Deputy Planning Manager Schwob stated that the cost would be for actual staff time that it took to review it and present it to the Planning Commission and City Council, which would probably be several thousand dollars. The time could be, at best, a three-month process, at worst, a six-month process.

Commissioner Thomas asked if it would be a possibility if the appeal were denied. The applicant could try to reestablish the basis for the property as something other than residential.

Deputy Planning Manager Schwob agreed that it would be an option.

Commissioner Weaver stated that her first issue was whether the use was continuous. It seemed, from the staff report, that between September 1995, and November 1996, there was a lapse in business operation. She asked if the printing company had a business license for another location and not this one.

Planner LaForte stated that the enclosure packet included the tax statement that showed another address in the City for the printing company. This was also true for Osborne Lumber who also had a license at a different address.

Commissioner Weaver stated that if it was found that there had not been a continuous use at this address, no other questions needed to be answered. The business had no right to be there. The Commission's determination must be based upon whether the use was a continuing, nonconforming, unexpanded use. It was not the Commission's job to ensure that the residential character of the neighborhood was kept. She stated that she needed guidance to make that determination, particularly on the issue of whether the use was continuous.

Commissioner Natarajan asked since the applicant had been using the property as a corporation yard without a business license for the last eighteen months, was that considered continuous use (a legal use)? She asked if there were any outstanding code enforcement issues that originally triggered this whole process.

Deputy Planning Manager Schwob stated that the City had refused to issue a business license and the applicant alleged that he was continuing a nonconforming use. The period from when the application was made in 2001, when the property was purchased, to today was not under consideration. The code enforcement process that came forth was as a result from complaints from neighbors concerning the debris, the large number of cats, the unkempt condition of the property.

Commissioner Natarajan asked if those complaints were prior to the applicant taking over the property.

Deputy Planning Manager Schwob stated that she was correct and the cleanup that the property had undergone made progress towards rectifying the nuisance violations.

Commissioner Wieckowski agreed that it was a two-step process for the Commission. It had to determine if the use was continuous. If the golf cart business had a cherry picker on site, the neighborhood could not have been the "average, quiet neighborhood. At least, in the normal sense if you have a cherry picker sitting over there as you watch the sun set." The original owner's use seemed to be a truly industrial use. He asked how critical should the determination be that someone has dotted all the I's and crossed all the T's to determine how a golf cart business with vehicles coming in and out was substantially different from the screening business that had brought in printing equipment to be repaired on the site. The appropriate use for this neighborhood, as determined by a CUP, was not before the Commission. He did not see an increase in intensity by this proposed use.

Commissioner Cohen asked how Section 8-22302 and the nonconforming use of land played into this decision.

Commissioner Natarajan read the section and stated that it said that, after a period of twenty years, the use became nonconforming and could continue as a nonconforming use.

Commissioner Cohen read, "When the nonconforming use of land on a lot has ceased for 90 days or more, such lots shall not again be put into a nonconforming use."

Commissioner Natarajan realized that she was reading subsection A.

Chairperson Cohen proposed that a decision be made or this item be continued for further analysis, as it seemed that there were more questions than answers.

Commissioner Natarajan saw the decision as whether the applicant needed to go through the CUP process. She believed that the CUP process was the way to move forward. Reading Section 8-22303, "A nonconforming use of a structure or building may be changed to a similar use or a use of lesser intensity upon approval of a Conditional Use Permit by the Planning Commission."

Chairperson Cohen and Commissioner Sharma agreed with her assessment.

Commissioner Wieckowski asked if the Commission upheld the Zoning Administrator's decision, would the applicant appeal the decision to Superior Court or appeal it to the City Council.

Senior Deputy City Attorney Barrett stated if that was what the Planning Commission recommended, it would be appealed to City Council.

Commissioner Harrison stated that he did not see an increase in the use of the property. He agreed that a "lumber yard is not a golf cart repair place is not a printing place is not a construction site." However, if this use was compared to when the use became nonconforming, which was Bodily Construction's corporate yard, he did not see that a CUP process was needed. He did not see a reason to continue this item, except to know what the property was like in 1956 and that was not possible. The applicant had improved the property and it was much better than before. He agreed with some of the neighbors, as he would not want the property next to his. However, the woman living across the street was in the "eagle-eye position" to describe the condition of the property before the applicant purchased it. He disagreed that the applicant's use should not be allowed, because the City had missed reevaluating the property when previous uses had changed. He agreed with the applicant

Commissioner Sharma believed that staff had spent much time studying this situation and that its recommendation should be followed.

Deputy Planning Manager Schwob replied that there were really two issues. Staff reached the conclusion based upon various forms of information. There were not always business licenses that were specific to this address, but there were insurance certificates that showed that the property had been insured for this use. The issue now before the commission was whether the current proposed use was of equal or lesser intensity than the prior nonconforming use of the property. Staff had not considered the comparison: whether the current proposed use should be compared to the use when it became nonconforming or should it be compared to the most recent prior use by Olympic Screen Crafts. If the Commission found that there had been continuous use and the proposed use was similar to what had been there before, that would be the end of it. The other approach was to have a hearing, decide if this use was similar or less intense than the prior uses of the property. The public testimony obviously added to the confusion.

Commissioner Natarajan asked if the Commission decided that this proposed use is not any more intense than previous uses, did not the applicant need a zoning administrator permit for a corporation yard.

Deputy Planning Manager Schwob replied that if it were decided that the proposed use was a continuation, then no permit would be required. If it were decided that the proposed use was a change of use, then a CUP would be required to determine whether the new use was equal or less intense than the prior uses. The zoning administrator permit would not come into play.

Commissioner Wieckowski asked if he had heard correctly that, prior to this hearing, staff had concluded that the use was continuous and the issue of intensity needed to be decided by

the commission. He asked if the Commission could be advised on the issue of continuousness or was it appropriate.

Senior Deputy City Attorney Barrett stated that it was appropriate for the Planning Commission to make that determination, if it felt that it had enough facts to base its decision upon.

Deputy Planning Manager Schwob noted that the public testimony may have changed the perception.

Commissioner Cohen believed that the two previous uses were very different. The use of the property, the use of the land and the use of the structure had changed. He found that this use was different from previous uses but similar to the original nonconforming use and needed to be decided if it was same under the code or whether the distinction that he had made was the appropriate one (and whether the Commission had the discretion to make that distinction). He assumed that the Commission had that discretion. The question was, did the original nonconforming use subsume the two or three different uses that came later. He agreed that there were very serious equitable issues for the owner. Historically, the Commission was sympathetic to errors made by new owners concerning property use, but the residents needed to be considered, also. The City Council should decide this question.

Commissioner Thomas was sympathetic with the purchaser of the property when he made the assumption that there would be no problem using the property as a corporation yard. She agreed that it was unfair that he could be punished for putting a lot of money into improving the property. His situation was similar to many that the Planning Commission had seen over the years. However, how many more applicants could be expected to come before the Planning Commission with problems with nonconforming uses and would use this decision as precedent? She asked what were the policies that allowed this to happen and how could the City prevent similar issues from coming before the Planning Commission? She recalled a recent similar occurrence involving a property owner who bought property along the back of many residences and it was discovered that the property line was incorrectly placed outside of the current residences property lines.

Chairperson Cohen acknowledged that there was equal unfairness here; to the neighbors and to the current owner. It was a difficult decision for the Commission. He reiterated that the decision should be made by the City Council.

Commissioner Thomas asked what the policies were and how staff planned to prevent further occurrences.

Deputy Planning Manager Schwob stated that the process of business licenses was essentially a collection of a tax and the process was not always plainly linked to the zoning and land use functions. Not all properties were 100 percent checked, some were submitted through the mail and some went to the Finance Department. The first business license issued after Bodily Construction was to Osborne Construction in the City of Newark. The best that he could tell was that Bodily Construction "morphed and became Osborne Lumber." Osborne Lumber consolidated their operations at another site and decided to lease the facility. The formal process may not have been undertaken by the City over the years, because storage of material, etc., seemed to be a lesser use.

Planner LaForte stated that he found business licenses for Forrest Bodily Construction and for the golf cart business. No licenses were linked to 401 Orchard Drive for Osborne Construction and the print screening company.

IT WAS MOVED (SHARMA/NATARAJAN) AND CARRIED BY THE FOLLOWING VOTE (4-3-0-0) THAT THE PLANNING COMMISSION HOLD PUBLIC HEARING;

AND

DENY APPEAL AND DIRECT APPLICANT TO APPLY FOR A CONDITIONAL USE PERMIT PURSUANT TO THE REQUIREMENTS OF FMC SECTION 8-22303.

The motion carried by the following vote:

AYES:	4 –Cohen, Natarajan, Sharma, Thomas
NOES:	3 – Harrison, Weaver, Wieckowski
ABSTAIN:	0
ABSENT:	0
RECUSE:	0

Chairperson Cohen advised the applicant that he had ten days from the date of this hearing to file an appeal with the City Clerks' office.

MISCELLANEOUS ITEMS

Information from Commission and Staff:

- Information from staff: Staff will report on matters of interest.
 - Deputy Planning Manager Schwob announced that a study session concerning the Fremont Hub would be held before the next regular meeting. The new owners were interested in remodeling and revitalizing the center and would make a presentation to the Commission.
 - A study session will occur the following week on geotechnical issues.

Commissioner Weaver stated that she may not be able to attend Fremont Hub study session, but she would attend the meeting afterward.
 - Commissioner Weaver asked that annual dinner be put on the next agenda.
 - Senior Deputy City Attorney Barrett stated that the new Commissioners had met with Larissa Seto, Senior Deputy City Attorney II, and she had been released to work part time.
 - Deputy Planning Manager Schwob reminded the new Commissioners that they had information concerning the voice mail system.
 - Deputy Planning Manager Schwob announced that the Planners Institute would be in March in the City of Monterey.
- Information from Commission: Commission members may report on matters of interest.
 - Commissioner Sharma again thanked staff for their help.
 - Commissioner Wieckowski asked if anyone was interested in attending a seminar concerning The Role of the Planning Commissioner to be held at U.C. Davis
 - Chairperson Cohen asked for this year's schedule of meetings.

Deputy Planning Manager Schwob stated that it had been distributed in the packets and agreed to send one to Chairperson Cohen.
 - Commissioner Thomas asked for an updated address and contact list, since there were two new Commissioners.

Meeting adjourned at 9:30 p.m.

SUBMITTED BY:

Alice Malotte
Recording Clerk

APPROVED BY:

Jeff Schwob, Acting Secretary
Planning Commission